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A  
PRACTICAL TREATISE  
OF THE  
**LAW OF EVIDENCE,**  
AND  
*DIGEST OF PROOFS,*  
IN  
**CIVIL AND CRIMINAL PROCEEDINGS.**

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**SECOND EDITION,**  
WITH CONSIDERABLE ALTERATIONS AND ADDITIONS.

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as to render it impossible, or at least difficult, to attribute them to the ordinary sources of such varieties, inattention or want of memory.

It would, theoretically speaking, be improper to omit to observe that the weight and force of the united testimony of numbers, upon abstract mathematical principles, increases in a higher ratio than that of the mere number of such witnesses. Aggregate force.

Upon those principles, if definite degrees of probability could be assigned to the testimony of each witness, the resulting probability in favour of their united testimony would be obtained not by the mere addition of the numbers expressing the several probabilities, but by a process of multiplication.

Such considerations, however, are of no practical importance. The maxim of law is *ponderantur testes non numerantur*. No definite degrees of probability can in practice be assigned to the testimonies of witnesses; their credibility usually depends upon the special circumstances attending each particular case, upon their connection with the parties and the subject-matter of litigation, their previous characters, the manner of delivering their evidence, and many other circumstances, by a careful consideration of which the value of their testimony is usually so well ascertained as to leave no room for mere numerical comparison.

In some instances, nevertheless, where from paucity of circumstances the usual means of judging of the credit due to conflicting witnesses fail, it is possible that the abstract principles adverted to may operate by way of approximation, especially in those cases where the decision is to depend upon the mere preponderance of evidence.

Fourthly, the *conformity* of their testimony with experience: As one principal ground of faith in human testimony is experience, it necessarily follows that such testimony is strengthened or weakened by its conformity or inconsistency with our previous knowledge and experience. A man easily credits a witness who states that to have happened which he himself has known to happen under similar circumstances; he may still believe, although he should not have had actual experience of similar facts; but where, as in the familiar instance stated by Mr. Locke (*p*), that Conformity with experience.

(*p*) Vol. II. p. 276. "The Dutch ambassador told the king of Siam that in his country the water was so hard in cold weather, that it would bear an elephant if he were there.

The king replied, Hitherto I have believed the strange things you have told me, because I looked upon you as a sober fair man, but now I am sure you lie."

is asserted which is not only unsupported by common experience, but contrary to it, belief is slow and difficult.

In ordinary cases, if a witness were to state that which was inconsistent with the known course of nature, or even with the operation of the common principles by which the conduct of mankind is usually governed, he would probably be disbelieved; for it might be more probable in the particular instance that the witness was mistaken, or meant to deceive, than that such an anomaly had really occurred. But although the improbability of testimony, with reference to experience, affords a just and rational ground for doubt, the very illustration cited by Locke shows that mere improbability is by no means a certain test for trying the credibility of testimony, without regard to the number, consistency, character, independence and situation of the witnesses, and the collateral circumstances which tend to confirm their statement (q). In ordinary cases, where a witness

(q) In observing upon the general principles on which the credibility of human testimony rests, it may not be irrelevant to advert to the summary positions on this subject advanced by Mr. Hume. He says, in his Essay, vol. 2, sec. 10, "A miracle is a violation of the laws of nature; and as a firm and unalterable experience has established these laws, the proof against a miracle, from the very nature of the fact, is as entire as any argument from experience can possibly be imagined." As a matter of abstract philosophical consideration (for in that point of view only can the subject be adverted to in a work like this), Mr. Hume's reasoning appears to be altogether untenable. In the first place, the very basis of his inference is that faith in human testimony is founded solely upon *experience*: this is by no means the fact; the credibility of testimony frequently depends upon the exercise of reason, on the effect of *coincidences in testimony*, which, if collusion be excluded, cannot be accounted for but upon the supposition that the testimony of concurring witnesses is true; so much so, that their individual character for veracity is

frequently but of secondary importance, *supra*, 486. Its credibility also greatly depends upon confirmation by collateral circumstances, and on analogies supplied by the aid of reason as well as of mere experience. But even admitting experience to be the basis, even the *sole* basis, of such belief, the position built upon it is unwarrantable, and it is fallacious, for if adopted it would lead to error. The position is, that human testimony, the force of which rests upon experience, is inadequate to prove a violation of the laws of nature, which are established by firm and unalterable experience. The very essence of the argument is, that the force of human testimony (the efficacy of which in the abstract is admitted) is *destroyed* by an opposite, conflicting and superior force, derived also from experience. If this were so, the argument would be invincible; but the question is, whether mere previous *inexperience* of an event testified is directly opposed to human testimony, so that mere inexperience as strongly proves that the thing *is not* as previous experience of the credibility of human testimony proves that it *is*. Now a miracle, or violation of the laws of

stands wholly unimpeached by any extrinsic circumstances, credit ought to be given to his testimony, unless it be so grossly impro-

nature, can mean nothing more than an event or effect never observed before, and to the production of which the known laws of nature are inadequate; and on the other hand, an event or effect in nature never observed before is a violation of the laws of nature: Thus, to take Mr. Hume's own example, "it is a miracle that a dead man should come to life, because that *has never been observed* in any age or country:" precisely in the same sense, the production of a new metal from potash, by means of a powerful and newly-discovered agent in nature, and the first observed descent of meteoric stones, were violations of the laws of nature; they were events which had never before been observed, and to the production of which the known laws of nature were inadequate. But none of these events can, with the least propriety, be said to be *against* or *contrary* to the laws of nature, in any other sense than that they have never before been observed, and that the laws of nature, as far as they were previously known, were inadequate to their production. The proposition of Mr. Hume ought then to be stated thus: human testimony is founded on experience, and is therefore inadequate to prove that of which there has been no previous experience. Now whether it be plain and self-evident that the mere negation of experience of a particular fact necessarily destroys all faith in the testimony of those who assert the fact to be true; or whether, on the other hand, this be not to confound the *principle* of belief with the *subject-matter* to which it is to be applied, and whether it be not plainly contrary to reason to infer the *destruction* of an active principle of belief from the mere *negation of experience*, which is perfectly consistent with the just ope-

ration of that principle; whether, in short, this be not to assume broadly that mere inexperience on the one hand is necessarily superior to positive experience on the other, must be left to every man's understanding to decide. The inferiority of mere negative evidence to that which is direct and positive, is, it will be seen, a consideration daily acted upon in judicial investigations. Negative evidence is, in the abstract, inferior to positive, because the negative is not directly opposed to the positive testimony; both may be true. Must not this consideration also operate where there is mere inexperience, on the one hand, of an event in nature, and positive testimony of the fact on the other? Again, what are the laws of nature, established by firm and unalterable experience? That there may be, and are, general and even *unalterable* laws of providence and nature, may readily be admitted; but that *human knowledge and experience* of those laws is unalterable (which alone can be the test of exclusion) is untrue, except in a very limited sense; that is, it may fairly be assumed that a law of nature once known to operate will always operate in a similar manner, unless its operation be impeded or counteracted by a new and contrary cause. In a larger sense, the laws of nature are continually alterable: as experiments are more frequent, more perfect, and as new phænomena are observed, and new causes or agents are discovered, human experience of the laws of nature becomes more general and more perfect. How much more extended and perfect, for instance, are the laws which regulate chemical attractions and affinities than they were two centuries ago! And it is probable that in future ages experience of the laws of nature will be more perfect than it is

bable as to satisfy the jury that he is not to be trusted. Thus, notwithstanding the general presumption of law in favour of

at present; it is, in short, impossible to define to what extent such knowledge may be carried, or whether, ultimately, the whole may not be resolvable into principles admitting of no other explanation than that they result immediately from the will of a superior Being. This at all events is certain, that the laws of nature, as inferred by the aid of experience, have from time to time, by the aid of experience, been rendered more general and more perfect. Experience, then, so far from pointing out any unalterable laws of nature, to the exclusion of events or phenomena which have never before been experienced, and which cannot be accounted for by the laws already observed, shows the very contrary, and proves that such new events or phenomena may become the foundation of more enlarged, more general, and therefore more perfect, laws. But whose experience is to be the test? That of the objector; for the very nature of the objection excludes all light from the experience of the rest of mankind. The credibility, then, of human testimony is to depend not on any intrinsic or collateral considerations which can give credit to testimony, but upon the casual and previous knowledge of the person to whom the testimony is offered; in other words, it is plain that a man's scepticism must bear a direct proportion to his ignorance. Again, if Mr. Hume's inference be just, the consequences to which it leads cannot be erroneous; on the other hand, if it lead to error, the inference must be fallacious. The position is, that human testimony is inadequate to prove that which has never been observed before; and this, by proving far too much for the author's purpose, is *felo de se*, and in effect proves nothing: for if constant inexperience amount

to stronger evidence on the one side than is supplied by positive testimony on the other, the argument applies necessarily to all cases where mere constant inexperience on the one hand is opposed to positive testimony on the other. According, then, to this argument, every philosopher was bound to reject the testimony of witnesses that they had seen the descent of meteoric stones, and even acted contrary to sound reason in attempting to account for a fact disproved by constant inexperience, and would have been equally foolish in giving credit to a chemist that he had produced a metal from potash by means of a galvanic battery. It will not, I apprehend, be doubted, that in these and similar instances the effect of Mr. Hume's argument would have been to exclude testimony which was true, and to induce false conclusions; the principle, therefore, on which it is founded, must of necessity be fallacious. Nay, further, if the testimony of others is to be rejected, however unlikely they were either to deceive or be deceived, on the mere ground of inexperience of the fact testified, the same argument might be urged even to the extravagant length of excluding the authority of a man's own senses; for it might be said, that it is more probable that he should have laboured under some mental delusion, than that a fact should have happened contrary to constant experience of the course of nature.

In stating that the inference attempted to be drawn from mere inexperience is fallacious, I mean not to assert that the absence of previous experience of a particular fact or phenomenon is not of the highest importance to be weighed as a circumstance in all investigations, whether they be physical, judicial, or historical: the more remote the subject of testimony

innocence, a defendant may be convicted of a heinous and even improbable crime upon the testimony of a single witness.

As experience shows that events frequently occur which would antecedently have been considered most improbable, from their inconsistency with ordinary experience, and as their improbability usually arises from want of a more intimate and correct knowledge of the causes which produced them, mere improbability can rarely supply a sufficient ground for disbelieving direct and unexceptionable witnesses of the fact, where there was no room for mistake.

Fifthly, Conformity with collateral circumstances: Direct testimony is not only capable of being strengthened or weakened to an indefinite extent, by its conformity on the one hand, or inconsistency on the other, with circumstances collateral to the disputed fact, but may be totally rebutted by means of such evidence. These positions lead immediately to an inquiry into the nature and force of indirect or circumstantial evidence.

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is from our own knowledge and experience, the stronger ought the evidence to be to warrant our assent. Neither is it meant to deny that in particular instances, and under particular circumstances, the want or absence of previous experience may not be too strong for positive testimony, especially where it otherwise labours under suspicion. What is meant is this, that mere inexperience, however constant, is not in itself, and in the abstract, and without consideration of all the internal and external probabilities in favour of human testimony, sufficient to defeat and to destroy it, so as to supersede the necessity of investigation. Mr. Hume's conclusion is highly objectionable in a philosophical point of view, inasmuch as it would leave phenomena of the most remarkable nature wholly unexplained, and would operate to the utter exclusion of all inquiry. Estoppels are odious, even in judicial investigations, because they tend to exclude the truth; in metaphysics they are intolerable. So conscious was Mr. Hume himself of the weakness of his general and sweeping position, that in

the second part of his 10th section he limits his inference in these remarkable terms, "I beg the limitations here made may be remarked, when I say that a miracle can never be proved so as to be the foundation of a system of religion; for I own that otherwise there *may possibly* be miracles or violations of the usual course of nature of such a kind as to admit of proof from human testimony."

In what way the use to be made of a fact when proved can affect the validity of the proof, or how it can be that a fact *proved* to be true is not true for all purposes to which it is relevant, I pretend not to understand. Whether a miracle, when proved, may be the foundation of a system of religion, is foreign to the present discussion; but when it is once admitted that a miracle *may be proved by human testimony*, it necessarily follows, from Mr. Hume's own concession, that his general position is untenable; for that, if true, goes to the full extent of proving that human testimony is *inadequate* to the proof of a miracle, or violation of the laws of nature.